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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
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8 BRETT JONES,

9 Petitioner,

10 vs.

11 GREG SMITH, *et al.*,

12 Respondents.
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Case No. 3:10-cv-00590-LRH-WGC

ORDER

14 This closed action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C.
15 § 2254 by a Nevada state prisoner. This matter comes before the Court on petitioner's motion for
16 Rule 60(b) relief and petitioner's motion for the appointment of counsel. (ECF Nos. 19 & 20).

17 On November 28, 2011, petitioner's federal petition was dismissed with prejudice as
18 untimely and procedurally defaulted. (ECF No. 17). The Court also denied petitioner a certificate
19 of appealability. (*Id.*). Petitioner did not file a notice of appeal or attempt to request a certificate of
20 appealability from the Ninth Circuit Court of Appeals. Petitioner did file an application for leave to
21 file a second or successive petition on July 16, 2014, in the Ninth Circuit Court of Appeals, Case
22 No. 14-72164. His application was denied on September 30, 2014.

23 On March 9, 2016, petitioner filed a motion for reconsideration, citing Rule 60(b) of the
24 Federal Rules of Civil Procedure. (ECF No. 19). Under Fed. R. Civ. P. 60(b) the court may relieve
25 a party from a final judgment or order for the following reasons:

26 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly
27 discovered evidence that, with reasonable diligence, could not have
28 been discovered in time to move for a new trial under Rule 59(b); (3)
fraud (whether previously called intrinsic or extrinsic),
misrepresentation, or misconduct by an opposing party; (4) the

1 judgment is void; (5) the judgment has been satisfied, released or
 2 discharged; it is based on an earlier judgment that has been reversed
 or vacated; or applying it prospectively is no longer equitable; or (6)
 3 any other reason that justifies relief.

4 A motion under Rule 60(b) “must be made within a reasonable time.” Fed. R. Civ. P. 60(c)(1).
 5 Relief based on mistake, newly discovered evidence, or fraud must be sought within one year of
 6 final judgment. Fed. R. Civ. P. 60(c)(1).

7 The plain language of Rule 60(b)(6), the Rule’s “catch-all provision,” provides for relief
 8 from a final order for “any justifiable reason.” However, courts have added a requirement that a
 9 party seeking Rule 60(b)(6) relief must demonstrate the existence of “extraordinary circumstances.”
 10 *Gonzales v. Crosby*, 545 U.S. 524, 535-36 (2005); *Lal v. California*, 610 F.3d 518, 524 (9th Cir.
 11 2010); *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (petitioner must demonstrate both an
 12 injury and circumstances beyond his control prevent him from proceeding with his claim).
 13 Extraordinary circumstances typically exist when “an extreme and unexpected hardship” would
 14 result if the relief sought is not granted. *Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 (3rd Cir.
 15 2008). Additionally, courts ordinarily will only grant relief if the moving party is not at fault and
 16 did not cause the extraordinary circumstances to come into being. *Id.*; *Gonzalez*, 545 U.S. at 535-
 17 36. Rule 60(b)(6) is to be used “sparingly as an equitable remedy to prevent manifest injustice.”
 18 *Lal*, 610 F.3d at 524.

19 In applying Rule 60(b)(6) to habeas petitions, the Ninth Circuit has considered six factors in
 20 exercising that discretion: (1) a showing of extraordinary circumstances, such as a change in
 21 intervening law; (2) petitioner’s exercise of diligence in pursuing the issue during federal habeas
 22 proceedings; (3) interest in finality; (4) delay between the finality of the judgment and the motion
 23 for Rule 60(b) relief; (5) the degree of connection between the extraordinary circumstances and the
 24 decision for which reconsideration is sought; and (6) comity between the state and federal courts.
 25 *Phelps v. Alameida*, 569 F.3d 1120, 1135-40 (9th Cir. 2009).

26 In this case, the federal petition was denied as untimely and procedurally barred. (ECF No.
 27 17). This Court found no basis for equitable tolling. (*Id.*, at p. 7). Petitioner also failed to show
 28 cause and prejudice to excuse the procedural default. (*Id.*, at p. 9). Petitioner now claims that he

1 can show cause and prejudice to excuse his procedural default, citing *Martinez v. Ryan*, 13 S.Ct.
2 1309 (2012). The Ninth Circuit has ruled that *Martinez* did not result in a retroactive new rule of
3 constitutional law. *Jones v. Ryan*, 733 F.3d 825, 843 (9th Cir. 2013). Petitioner does not address
4 any basis why this Court should reconsider its ruling that his petition was untimely filed and
5 procedurally defaulted.

6 Moreover, none of the Rule 60(b)(6) factors weigh in favor of reconsidering the Court's
7 order dismissing the petition. There has not been an intervening change in the law. Petitioner has
8 not exercised diligence in bringing his Rule 60(b) motion almost five years after his petition was
9 dismissed. The State has an interest in the finality of judgments. Comity between the state and
10 federal courts would not be advanced by this Court reconsidering its previous ruling. Petitioner has
11 not shown extraordinary circumstances justifying reconsideration of the order dismissing the
12 petition with prejudice. Petitioner's Rule 60(b) motion is denied.

13 Concurrent with his Rule 60(b) motion, petitioner filed a motion for the appointment of
14 counsel. (ECF No. 20). This case has concluded and the Court has denied petitioner's motion for
15 Rule 60(b) relief. As such, petitioner's motion for the appointment of counsel is denied.

16 **IT IS THEREFORE ORDERED** that petitioner's motion for Rule 60(b) relief (ECF No.
17 19) is **DENIED**.

18 **IT IS FURTHER ORDERED** that petitioner's motion for the appointment of counsel (ECF
19 No. 20) is **DENIED**.

20 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
21 **APPEALABILITY**.

22 DATED this 15th day of March, 2017.

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26 LARRY R. HICKS
27 UNITED STATES DISTRICT JUDGE
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